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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

THE STATE OF NEBRASKA, COMPLAINANT,

vs.

THE STATE OF WYOMING, DEFENDANT.

and

THE STATE OF COLORADO, IMPLEADED DEFENDANT,
THE UNITED STATES OF AMERICA, INTERVENOR.

BRIEF FOR THE STATE OF COLORADO, IMPLEADED DEFENDANT.

H. LAWRENCE HINKLEY,
Attorney General of the State of Colorado,

JEAN S. BREITENSTEIN,
GEORGE J. BAILEY,
THOMAS J. WARREN,
GAIL L. IRELAND,
CLIFFORD H. STONE,
Special Counsel for the State of Colorado.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 6 Original

THE STATE OF NEBRASKA, COMPLAINANT,

vs.

THE STATE OF WYOMING, DEFENDANT.

and

THE STATE OF COLORADO, IMPLEADED DEFENDANT,
THE UNITED STATES OF AMERICA, INTERVENOR.

BRIEF FOR THE STATE OF COLORADO, IMPLEADED DEFENDANT.

JURISDICTION.

This is an action involving three states and the United States. Original jurisdiction is invoked under Article III, Sec. 2, Cl. 2, of the Constitution of the United States and Section 233 of the Judicial Code (28 U. S. C. A. Sec. 341). Leave was granted Nebraska to file its bill of complaint against Wyoming on October 15, 1934 (293 U. S. 523, 55 S. Ct. 115). Pursuant to the prayer of the Wyoming amended answer, the Court ordered on December 23, 1935, that Colorado be made a party defendant (296 U. S. 553, 56 S. Ct. 369). On May 16, 1938, an order was entered

granting the motion of the United States for leave to intervene (304 U. S. 545, 58 S. Ct. 1035).

STATEMENT OF FACTS.

1. IN GENERAL

This matter is before the Court on exceptions which have been filed by all parties to the Report of the Special Master. The controversy involves the use for irrigation purposes of water of a non-navigable[1] interstate stream, the North Platte River. There is no issue between the parties on the use of water for domestic, municipal, power generation, industrial or navigation purposes. While in some of the pleadings and some of the evidence issues are presented as to the South Platte River, which joins the North Platte in Nebraska to form the Platte River, and as to the division of the waters of the Laramie River, a tributary of the North Platte, none of the exceptions raises any point in regard to these two streams.

In Colorado and Wyoming and in the affected section of Nebraska the appropriation system of water law applies.

The United States, through the Bureau of Reclamation of the Department of Interior, has constructed a major irrigation development known as the North Platte Project which stores water in the Pathfinder Reservoir in Wyoming for use on lands located in both Wyoming and Nebraska, and is engaged in the construction of the uncompleted Kendrick Project which stores water in Seminoe and Alcova Reservoirs in Wyoming for the contemplated irrigation of land in Wyoming. Neither of these projects, nor any other project of the United States, involves the storage, diversion or use of water in the portion of the North Platte basin located in Colorado.

2. POSITION OF COLORADO.

Colorado says that both the record and the Report of the Special Master show affirmatively and conclusively that

[1] The fact that the stream is non-navigable is affirmatively alleged in the pleadings of each party (see Nebraska Complaint, p. 6; Wyoming Amended Answer, p. 3; Colorado Answer, p. 2; United States Petition in Intervention, p. 2).

Colorado water uses in the North Platte basin have not injured and do not constitute an immediate threat of injury to any downstream water user and accordingly a judgment of dismissal should be entered in its favor.

The Master has found that existing Colorado uses are within the equitable share of Colorado and that the threat of additional depletion in the future is not immediate (R. 128-133).[2] None of the parties has excepted to this finding of the Master. The Master has made no finding that damage has been inflicted on any of the parties by existing Colorado uses or that there is an immediate threat of injury to any of the parties through increased use of North Platte water in Colorado. None of the parties has excepted to the failure of the Master to make such findings.

Colorado is in the case because of the geographical accident of artificial boundaries which have placed the headwaters of the North Platte in Jackson County, Colorado. The only concern which Colorado has in matters of water use downstream from its borders is that the water requirements in such areas be fairly appraised so that there may be imposed on Colorado no inequitable burden of supplying water for such uses. While Colorado believes that the requirements as found by the Master are on the liberal side, particularly as to those areas supplied by diversions in the Whalen-Tri-State Dam section of the river, it recognizes that there is substantial evidence in the record to sustain the findings. Accordingly, it has filed no exceptions in regard to the water requirements of the downstream areas.

Colorado has no concern with the administrative complications resulting from the storage in Wyoming of water for use on lands of the federal North Platte Project located in both Wyoming and Nebraska. It believes that the prob-

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[2] In this brief identifying references preceding page numbers are as follows:

"R." — Master's Report.
"Tr." — Transcript of Record.
"App."— Appendix to this brief.

In referring to exhibits the abbreviated name of the party offering the exhibit and the exhibit number will be used, for example, Colo. Ex. 58.

lem involves practical considerations rather than fundamental legal questions. Whatever controversies exist as to administration because of storage in one state for use in another can and should be settled by amicable agreement. A justiciable controversy is not presented by mere differences of opinion as to the extent of sovereign, or quasi-sovereign, power.

Likewise, Colorado has no interest in the dispute which exists on the question of whether the federal Kendrick Project in Wyoming constitutes a threat of additional water depletion in Wyoming which will substantially injure Nebraska and its water users. While Colorado believes that the available water supply is ample to satisfy the requirements of the Kendrick Project, and all existing water rights, it will not argue the matter because obviously it cannot be affected by the outcome. However, Colorado has one vital interest in regard to the Kendrick Project. By the terms of the Congressional Act[3] appropriating funds for the construction of the Kendrick Project it was provided that neither the construction, maintenance nor operation of that project should ever interfere "with present vested rights or the fullest use hereafter for all beneficial purposes of the waters of said stream or any of its tributaries within the drainage basin thereof in Jackson County, in the State of Colorado." *This statute was absolutely ignored by the Master in his Report.* By its Exception IV Colorado asserts that if any affirmative decree is to be entered against it in this case full effect must be given to this statute.

The intervention of the United States raises no issue which directly affects Colorado since in the Colorado portion of the North Platte basin there is no federal water use project. However, Colorado does have an indirect interest in the federal claims as a precedent may be established in this case which might govern a future decision involving federal water use projects on other stream basins in Colorado. The Colorado position is that the Master correctly concluded that the Secretary of the Interior (representing the United States) is an appropriator under the laws of

[3] Act of August 9, 1937, 50 Stat. Pt. 1, Chap. 570, p. 595.

Wyoming and occupies the same position as any private appropriator of a similar water right (R. 176).

The Master has recommended (R. 179) that the parties be permitted to apply at the foot of the decree for its amendment or for further relief and that the Court retain jurisdiction for such purposes. Colorado says that the practical effect of the incorporation of any such provision in a decree in this case would be the assumption by the Court of the administration of the stream. The exercise of such administrative control over an interstate stream is utterly incompatible with the judicial function and is contrary to the jurisdiction and powers of this Court as defined by the Constitution and by statute.

With the exception of minor inconsistencies which will be mentioned later, Colorado accepts, for the purpose of this presentation to the Court, the Master's findings of fact. By making this statement Colorado does not intend to waive or surrender any right to advance or contend for facts contrary to those found by the Master at any subsequent stage in this case or in any other case except to the extent that it would be precluded from so doing by the application of the well known principles of the law of the case and *res adjudicata*. The conclusions of fact and conclusions of law to which Colorado objects have been specifically enumerated in the Colorado exceptions to the Master's Report.

3. THE PLEADINGS.

The Nebraska complaint does not assert any claim against Colorado.

Wyoming moved to dismiss the Nebraska complaint, one of the stated grounds of such motion being that Colorado was an indispensable party to the suit. This motion was denied by the Court (295 U. S. 40, 55 S. Ct. 568).

The Wyoming amended answer alleges (Par. 20) that thirty per cent of North Platte River water originates in Colorado; that the rights of Colorado and Wyoming to the use of North Platte water have never been determined; that

Colorado contemplates projects that would deplete the water supply of the North Platte by 250,000 acre-feet annually; and that an equitable allocation of North Platte water cannot be made unless Colorado is a party to the suit. Wyoming further asserts (Par. 22) that in 1923 Nebraska and Colorado entered into the South Platte Compact, the effect of which is "to relieve the waters of the South Platte River from any and all obligations to contribute to the supply of the waters of the Platte River required for the satisfaction of the rights out of the Platte River." The prayer of the Wyoming complaint is that Colorado be made a party and that the Court make an equitable apportionment between Nebraska, Wyoming and Colorado of the waters of the North Platte.

Colorado, having been made a party by order of this Court appearing at 296 U. S. 553, 56 S. Ct. 369, filed an answer and cross-bill. In Part I of its answer Colorado sets forth its allegations as to the physical conditions along the stream and agrees with Wyoming in denying the dependence upon irrigation in Nebraska and in asserting the extravagant waste of water in that state. Part II of the Colorado answer responds to such parts of the Wyoming amended answer as constitute a cross-bill against Colorado. Therein it is alleged (Par. 4) that the physical facts are such that it would be difficult, if not impossible, to regulate justly and equitably the use of the North Platte waters throughout the course of that stream strictly upon the basis of the rule of priority; (Par. 6) that Colorado and its citizens have investigated the feasibility of additional projects for the use of North Platte water in Colorado and "the aggregate effect of all such proposed and contemplated projects, if all of the same had been constructed, would have been to take from the said river an additional quantity of water approximating 250,000 acre-feet per annum; that Colorado contemplates and threatens no diversion or use of North Platte water in excess of its reasonable, just and equitable share; and (Par. 7) that the South Platte Compact effectively and finally apportioned the waters of the South

Platte River for all purposes as between Colorado and Nebraska.

Part III of the Colorado answer, in response to the Wyoming demand that Colorado set up its interest in the South Platte River, contains a description of that basin and the Colorado water uses therein.

Part IV of the Colorado answer relates to the North Platte and is a cross-bill against Wyoming and Nebraska. It is alleged that the adoption of an interstate priority schedule as sought by Nebraska will increase the amount of the surplus which flows out of the irrigated portion of the basin (Par. 12); that the effect of the construction of the Kendrick Project in Wyoming will be to create an unequal status between Wyoming and Colorado and give to Wyoming an unreasonably large share of the benefits arising from the flow of the stream (Par. 14); that additional North Park projects would have been constructed except for the refusal of the Interior Department to grant rights of way, an action which has had the effect of unjustly reserving for Wyoming the surplus water in the stream; and that Colorado initiated rights should be recognized as senior and superior to Kendrick (Par. 17).

In the Wyoming answer to the Colorado cross-bill it is alleged (Par. 15) that "no plans for the diversion of North Platte River waters into the Cache la Poudre River basin have ever been definitely formulated by the State of Colorado or any of its citizens, that such plans, whatever they may be, have never advanced beyond the speculative state, and that if there be need for a supplemental supply of water in the Cache la Poudre River basin such supply can be obtained from other sources in the State of Colorado;" and (Par. 17) that there are no Colorado projects having the basis of any actual claim and contemplated Colorado projects have "never passed beyond a stage purely conjectural and speculative in character."

The Nebraska answer to the Colorado cross-bill avers in Par. 15 that:

"This complainant further admits that inchoate plans have been suggested in the State of Colorado for the diversion and use of additional quantities of water from North Platte River, but on that behalf, this complainant avers, upon information and belief, that most of such plans have not progressed beyond the paper stage and that no physical acts have been done looking toward the completion of the same."

The United States petition of intervention asserts two causes of action. The first is based upon the theory that the United States through territorial cessions became the owner of all lands and water in the basin; that the United States has not abdicated its rights in the water; and that it "reserved and withdrew" unappropriated water of the North Platte for the North Platte and Kendrick Projects.

The second cause of action asserts the theory that the United States holds appropriative rights to water for use on the North Platte and Kendrick Projects by reason of compliance with the Wyoming and Nebraska laws pertaining to the establishment of appropriation rights.

All three states by individual answers to the United States petition in intervention deny that the United States has withdrawn or reserved water for its projects; assert that the waters of the stream are under the jurisdiction and control of the states; and allege in effect that the position of the United States is the same as any other appropriator under state law.

4. THE EVIDENCE.

Colorado has 6% of the drainage area of the North Platte River basin, exclusive of the Laramie (R. 20). It contributes 21% of the original production of water (R. 22) and in 1939 it had 15% of the irrigated acreage in the basin.[4]

Except for the basin of the Laramie River, the North Platte River and its tributaries in Colorado drain only Jackson County, which is located in the north-central part

[4] As computed from table appearing at R. 29.

of the state and has as its northern boundary the Colorado-Wyoming state line (R. 16). Jackson County is a saucer shaped area, largely surrounded by mountain ranges and with a comparatively level interior valley commonly referred to as North Park (R. 42). The principal industry is the livestock business which is based on irrigation of native hay meadows to produce winter feed and on summer grazing in the adjacent national and state forests (R. 43).

Most of the irrigated lands are at an elevation of 8,000 to 8,500 feet. The climate is arid with an annual average precipitation in the valley of 10 inches and a seasonal precipitation, during the growing season, middle of May to middle of July, of 2.35 inches (R. 42). Irrigation is indispensable to crop production.

The consumptive use of water is very low, amounting to but 0.74 acre-feet per acre (R. 44). The Master finds that the average annual water depletions in Jackson County are (R. 44):

By Irrigation Uses	97,500 acre-feet
By Reservoir Evaporation Losses	1,040 acre-feet
By Exportations to the Poudre Basin	6,000 acre-feet
Total	104,540 acre-feet

This amount equals 16.5% of the total average annual water production in Jackson County of 635,100 acre-feet (R. 125).

The Master has found that irrigation began in Jackson County about 1880; that there was a steady expansion for about thirty years resulting in an irrigated acreage in 1910 of 113,500 acres; that by 1920 the development had come to a practical standstill with the following years adding but 2,670 acres; and that the present irrigated acreage is 131,800 acres (R. 43).[5]

[5] The 1940 Census shows an irrigated acreage in the North Platte basin in Jackson County, Colorado of 154,279 acres (See U. S. Ex. 204-B, App. p. 25). In all probability the difference between this figure and the figure of 131,800, as testified by Colorado witness Patterson, is that the Patterson figure excludes all land under existing water-use facilities not actually irrigated in 1939.

In addition to the irrigated acreage there are 30,390 acres of irrigable land[6] located under constructed ditch systems having decreed rights (R. 44). There are also 34,400 acres of arable land suitable for irrigation and physically accessible to sources of water supply (R. 45). This arable land is chiefly located under the so-called defeated projects (R. 45), the development of which was prevented by the federal embargo on rights of way and reservoir sites.

There are exportations of water in Colorado from the North Platte basin to the Cache la Poudre, a tributary of the South Platte. These are effected by the Cameron Pass and Michigan ditches, the average annual diversions of which in the period 1913-1939 were 4,069 acre-feet (R. 46). The Colorado testimony is that, under present conditions of development of the ditches, future exportations will average 6,000 and that they could be increased to 12,000 acre-feet annually by feasible extensions and enlargements not involving either tunnels or pump lifts (Tr. 22165-22167, App. p. 40).

The need for the use of more water in Jackson County was described by witnesses who pointed out that under the Taylor Grazing Act (48 Stat. 1269, 43 U. S. C. A. 315) the restrictions on grazing in the national forests required longer periods of grazing on valley pastures, a condition which is possible of attainment only if there is an increase in the irrigated pasturage. In other words, if the livestock industry in the county is to be maintained on the present level, an increase in the irrigated acreage is necessary (Tr. 23172, App. p. 52).

Jackson County had a population in 1940 of 1,778, and Walden, the county seat and only incorporated town, had a population of 662.[7] The hay crop averages approximately

[6] The statement of the Master on page 45 that the 30,390 acres of "irrigable" land includes that in the Walden Ditch and Reservoir Company, the Jackson County Land and Irrigation Company and a few other small undeveloped projects is an inadvertent error. The 34,400 acres of arable land represents the area under these undeveloped projects. The 30,390 acres represents land irrigable under existing water facilities. (See Colo. Ex. 58, App. p. 7.)

[7] These figures are from the 1940 Census. The population figures given by the Master on page 43 are from the 1930 Census.

90,000 tons and the cattle marketed in the period 1929-1938 had an average value estimated at $645,000 (R. 43). In 1938 there were 244 ranches in the county of an average size of 1,400 acres and an average value of $12,000 (Tr. 23387, App. p. 53).

No regulation or limitation has ever been imposed upon water users in North Park for the benefit of Wyoming or Nebraska or their appropriators (R. 47). The Colorado Water Commissioner Boston testified that there has never been any request by any Wyoming or Nebraska appropriator for any regulation of the North Platte or any of its tributaries in Colorado for their benefit (Tr. 23136, App. p. 52).

No evidence was introduced as to any damage which has resulted to any downstream area as a result of any stream depletions in Colorado.

No evidence was introduced as to any controversies between the administrative officials of Colorado and any of the other litigants over the diversion and use of water in Colorado.

No evidence was introduced of any immediate threat of additional stream depletions in Colorado.

5. THE CONCLUSIONS AND RECOMMENDATIONS OF THE MASTER AFFECTING COLORADO.

The Master concludes (R. 128):

> "From a consideration of all the factors bearing on those equities, my judgment is that equitable apportionment does not require any interference with present uses in North Park."

The Master finds that there is a threat of further depletion of the river in North Park, but he says with regard to such threat (R. 130):

> "It can hardly be said to be immediate."

The Master thus summarizes his conclusions relative to Colorado (R. 132):

"A prohibition aganst further expansion of irrigation in North Park seems to me recommended by consideration of (a) the insufficiency of the present supply at best to more than satisfy the requirements of presently established uses, (b) the principle laid down in *Colorado v. Wyoming,* (c) the consonance of such limitation with the general plan of apportionment being recommended herein. At the same time to impose a permanently fixed restriction against further irrigation development in North Park would not appear justified in view of the possibility of such future increase in supply as to render it unnecessary. The three alternatives are (1) an outright dismissal as to Colorado, (2) denial of any present relief against that state with retention of jurisdiction to grant such relief on a later showing of such continuation of present conditions of supply as to require the conclusion that they must be accepted as the measure of dependability, (3) imposition of a limitation to present uses of water with retention of jurisdiction to release the restriction if and when the 'dry cycle' shall run its course and it appears that the water supply has become such as to justify further expansion of irrigation in North Park. A reasonable argument can be made for any of these three alternatives. My recommendation in line with the third alternative is that Colorado be limited to the irrigation of 135,000 acres, to the accumulation annually of 17,000 acre-feet of storage water, and the exportation of 6,000 acre-feet per annum to the South Platte basin."

The Master recommends the entry of a decree which would so far as it affects Colorado have the effect of (R. 177):

"Enjoining Colorado (a) from the diversion of water for the irrigation in North Park of more than 135,000 acres of land, (b) from the accumulation in storage facilities in North Park of more than 17,000 acre-feet of water between October 1 of any year and September 30 of the following year, and (c) from the

transbasin diversion out of North Park of more than 6,000 acre-feet of water between October 1 of any year and September 30 of the following year."

The Master makes some seven other recommendations for decretal provisions. He points out that his recommendations are not interdependent and that the omission of some would not preclude the adoption of others. *In rating their relative importance he places the quoted recommendation affecting Colorado next to last* (R. 180).

SPECIFICATIONS OF POINTS TO BE URGED.

Colorado contends:

1. It is entitled to a judgment dismissing it from the case because there is no showing that it has injured or presently threatens to injure any of the other parties.

2. If an affirmative decree is to be entered against Colorado, then the recommendations as to the form of such decree are inequitable.

3. The conclusions and recommendations of the Master violate the Act of August 9, 1937, giving Colorado water uses preferential rights over uses on the Kendrick Project in Wyoming.

4. The recommendations of the Master require the exercise of administrative and legislative functions by the Court and hence are improper.

SUMMARY OF THE ARGUMENT.

Colorado has filed five exceptions. The first two of these, relating to dismissal, are grouped together for the purpose of argument. The argument for Colorado may be summarized thus:

I. Colorado is entitled to a judgment of dismissal because:

   1. Timely motions for dismissal were presented.

   2. It has not been pleaded that Colorado water uses injure any downstream area.

3. There is no evidence that existing Colorado water uses have injured any downstream area.

4. There is no evidence of any immediate threat of injury by Colorado.

5. No downstream area has suffered any damage.

6. Lack of damage is shown by the increase in irrigated acreage in downstream areas.

7. Lack of injury precludes any affirmative relief against Colorado.

8. A potential threat of injury does not justify any affiirmative relief.

9. The recommendations of the Master are contrary to the rules established in interstate suits.

   (a) *Wyoming v. Colorado* is not an exception.

   (b) The pleadings in this case do not justify any departure from the general rule.

10. The Master has misconceived the rule of equitable apportionment.

II. The recommended injunctive decree is inequitable because:

1. There are errors in its provisions.

2. It is based upon the assumption that an apportionment should be made upon the basis of drouth conditions and hence is inequitable because:

   (a) An assumption that abnormal drouth conditions will continue is speculative.

   (b) Water shortage should be shared and not imposed unproportionately upon any river section.

   (c) Surplus water supplies are inequitably allocated to downstream areas.

(d) The effect of the newly constructed Seminoe and Alcova Reservoirs is ignored.

3. The definition of Colorado rights is inequitable.

4. The relationship between Colorado water uses is distributed.

III. The Master has ignored the Act of August 9, 1937, giving Colorado water uses preferential rights over the Kendrick Projects in Wyoming.

IV. The recommendation to permit modification of the decree under certain conditions is objectionable because:

1. It requires the Court to exercise administrative and legistlative functions.

2. Definition of state rights should be on a permanent basis.

3. The effect of the recommendation is to shift the burden of proof in an interstate suit.

ARGUMENT.

I.

COLORADO IS ENTITLED TO A JUDGMENT OF DISMISSAL.

1. COLORADO PRESENTED TIMELY MOTIONS FOR DISMISSAL.

At the conclusion of the Nebraska case and again after all the evidence was in, Colorado noted in the record a motion for dismissal of the suit (Tr. 15,846-15,848, App. p. 27; Tr. 29,471-29,474, App. p. 29).

The grounds for these motions are substantially the same and are in general effect that:

1. There is no pleading that charges that Colorado has committed or threatens to commit any injury to any litigant.

2. There is no substantial evidence sufficient to sustain any judgment against Colorado.

The motions for dismissal went to the sufficiency of the evidence to sustain any judgment in favor of, or against, any party litigant. At this time Colorado desires to argue this matter only upon the point of whether or not any affirmative relief should be granted against Colorado. While Colorado still believes that, under the rules which have been announced by this Court in connection with interstate litigation, there has been no showing in this case which is sufficient to entitle any party to any affirmative relief, the argument herein will be confined to the Colorado situation except insofar as the general principles referred to may be deemed to have applicability to the situations involving the other litigants.

2. THERE IS NO CLAIM ASSERTED IN THE PLEADINGS THAT COLORADO HAS INJURED OR PRESENTLY THREATENS TO INJURE ANY DOWNSTREAM WATER USER.

The Nebraska Bill of Complaint did not join Colorado as a defendent and does not assert any claim against Colorado.

The Wyoming amended Answer states that the rights of Colorado and Wyoming to the use of North Platte river water have never been determined, that Colorado contemplates wa er projects which would deplete the supply of the North Platte by 250,000 acre-feet annually and that an equitable allocation of North Platte water cannot be made unless Colorado is a party to the suit (Wyoming Amended Answer, paragraph 20).

In its answer to such parts of the Wyoming Answer as constitute a cross-bill against it, Colorado admits that its citizens have carried on investigations to determine the physical and economic feasibility of additional diversions and uses of North Platte river water, and that the aggregate effect of all of such projects, if constructed, would have been to take from the river an additional quantity of water approximating 250,000 acre-feet per annum (Colorado Answer and Cross-Bill, Part III, paragraph 6).

A similar allegation is contained in Part IV, paragraph 15 of Colorado's Answer and Cross-Bill.

In response to these allegations the Wyoming Answer to the Colorado Cross-Bill alleges (Par. 17) that these Colorado projects have *"never passed beyond a stage purely conjectural and speculative in character."* [8]

Nebraska in its answer to the Colorado Cross-Bill, paragraph 15, alleges that:

> *"Inchoate* plans have been suggested in the State of Colorado for the diversion and use of additional quantities of water from the North Platte river, but on that behalf this complainant avers upon information and belief that most of such plans have *not progressed beyond the paper stage* and that no physical acts have been done working toward the completion of same."

The status of the pleadings thus is that:

1. No party has claimed that existing Colorado uses have inflicted any injury upon any downstream water user.

2. Colorado, while admitting that its citizens have planned projects which, if constructed, would deplete the stream further, has not asserted that any of such projects will ever be built or are feasible of construction.

3. Both Wyoming and Nebraska plead that the proposed Colorado projects are of an inchoate and speculative character.

4. The United States has made no allegation which in any way refers to Colorado water uses existing or threatened.

8. THERE IS NO EVIDENCE THAT EXISTING COLORADO WATER USES HAVE INJURED ANY DOWNSTREAM WATER USER.

On this point it is sufficient to refer to the findings and conclusions of the Special Master. We quote first from paragraph 6 on page 9:

> "Equity does not require any restriction upon or interference with the present uses of water by Colorado within the North Platte basin in North Park or

[8] All italics in this brief are supplied by the author.

any reduction in the present rate of transbasin exportation from North Park."

Again on pages 125 and 126 of his report the Master says:

> *"Furthermore, reduction in Colorado use would not correspondingly enchance the supply of the other States.* In fact there is no clear showing as to the extent of benefit to the North Platte Project or other Wyoming or Nebraska users of any limitation upon present uses in North Park."

And on page 128 of his report the Master says:

> "From a consideration of all of the factors bearing on those equities, my judgment is that equitable apportionment does not require any interference with present uses in North Park."

The recommendations of the Master for a decree, paragraph 1, page 177, follow the alternative stated by the Master in sub-division 3 on page 132, that there should be,

> "Imposition of a limitation to present uses of water with retention of jurisdiction to release the restriction if and when the 'dry cycle' shall run its course and it appears that the water supply has become such as to justify further expansion of irrigation in North Park."

The only exceptions which have been filed by the other parties in connection with these findings of the Master are Nebraska Exceptions numbered 3 and 22. In the absences of any pleading by Nebraska that the present Colorado water uses have injured it or any of its citizens, it would seem that these Nebraska execptions can go only to the point that the Master's definition of existing Colorado uses is too liberal. This point will be discussed later.

Attention is also directed to the finding of the Master on pages 37 and 38 of his report that:

"On Colorado no demand for regulation has been made by Nebraska or Wyoming prior to the commencement of this suit * * * *."

4. THERE IS NO EVIDENCE OF ANY IMMEDIATELY THREATENED INCREASE IN STREAM DEPLETIONS OF COLORADO WHICH WILL INJURE ANY DOWNSTREAM WATER USER.

Here again it is sufficient to refer to the findings of the Master. On page 45 in discussing the Colorado water use projects which were contemplated but on which no progress has been made, on one since 1911 and on the other since 1915, the Master states:

"The record indicates that the completion and utilization of these projects is nothing more than a possibility of the indefinite future."

On page 129 the Master characterizes these same projects as *"latent projects representing mere possibilities of the indefinite future."*

It is true that on pages 129-130 the Master says that the intention and claims of Colorado may, in his opinion, properly be regarded as constituting a threat of future depletion of the river. But the Master states positively on page 130 that:

"The more doubtful question is whether the threat is so imminent and serious as to require judicial intereference. *It can hardly be said to be immediate.* It seems very doubtful that Colorado will undertake any expansion of irrigation in North Park under present drouth conditions. Should there be a return to former conditions, additional development might be permissible."

None of the parties has filed any exceptions to these findings of the Master. No party has filed any exception to the failure of the Master to find that Colorado contemplates additional transmountain diversions which will deplete the stream to the injury of downstream users. No party introduced any evidence in this regard. In fact the only testimony upon this point came from the Colorado

witness Patterson who testified that enlargements and extentions of the existing transmountain diversion facilities might result in an increase in such transmountain diversions of 6,000 acre-feet a year (Tr. 22,165, App. 22,167). There is absolutely no evidence that such enlargements of extensions are contemplated by anyone.

5. THERE IS NO EVIDENCE THAT ANY DOWNSTREAM AREA HAS SUFFERED ANY DAMAGE.

It has heretofore been pointed out that neither Wyoming nor Nebraska have pleaded that their interests have been damaged by Colorado stream depletions.

The Master has made no finding that Wyoming, or any of its water users, have been damaged by Colorado. No party has excepted to the failure of the Master to make such a finding.

In regard to Nebraska the Master finds (R. 105) that:

> "If to sustain her burden of proof Nebraska must establish not only violations of her priorities or infringement otherwise on her equitable share by the other States, but also that as a result she has suffered injury of great magnitude in the broad sense of serious damage to her agriculture or industries or observable adverse effects upon her general economy, prosperity or population, *then her proof has failed, for there is no clear evidence of any of these things.*"

Again on page 90 the Master, after referring to statistics showing the crop production in western Nebraska Counties, states:

> "The statistics given, read in connection with this testimony, are an impressive demonstration of the vital importance and value of irrigation in these western Nebraska counties. Undoubtedly there could have been without it no such agricultural development as has occurred. *On the other hand, when scanned for evidence of serious drouth damage since 1931, the statistics are equivocal.*"

And again on page 91, the Master states:

> "The statistics, taken all in all, are, to say the least, inconclusive as to the existence or extent of damage to Nebraska by reason of the drouth or by reason of any deprivation of water by wrongful uses in Wyoming or Colorado."

The only exceptions filed to these findings of the Master are Nebraska Exceptions 13 and 20. It is submitted that the findings of the Master are based upon the overwhelming preponderance of the evidence and should be accepted by this Court.

Attention is also directed to the fact that the Master finds in paragraph 5 on page 9 that:

> "Lands in Nebraska supplied by diversions below the so-called Tri-State Dam have no equitable claim upon direct flow water originating in Wyoming or Colorado." (See also Report, page 92).

While Nebraska has excepted to this finding of the Master (See Nebraska Exceptions 2 and 14), it is submitted that the Master here also is sustained by the overwhelming preponderance of the evidence.

Since Nebraska is, under the findings of the Master, entitled to the delivery of no upstream water for the satisfaction of diversions below the Tri-State Dam, the question of injury is narrowed to a consideration of whether or not the supply in this area has been adequate. Attention is directed to the finding of the Master in his Report on page 158:

> *"Even during the dry cycle and with no restriction on Wyoming uses, the usable water passing Tri-State Dam averaged in the May-September period 81,700 acre-feet.* More than half of this flow, however, occurred in May and June with comparatively little in August and September."

While it is true that the Master continues the above statement with the observation that this is a minor factor

in the balancing of equities between the States, we submit that it shows conclusively that Nebraska has not been damaged by upstream water depletions.

The only argument that Nebraska has seriously advanced on the question of damage is that water has been diverted in upstream areas under rights junior to Nebraska rights which at the time were either receiving no water or an insufficient supply. Simply stated the claim is that Nebraska has been deprived of water. This is not enough to show damage. This case concerns water for irrigation uses. Injury does not result from the deprivation of water for irrigation uses unless there is a showing of a need of the water for beneficial consumptive use at the time by those claiming to have been wrongfully deprived thereof. If the water is not needed by the downstream senior rights, the closing of upstream junior rights will result merely in waste. Injury results from loss of water when the effect is to cause crop failures, but Nebraska has made no such showing. The evidence shows conclusively, and the Master finds (see table at R. 29), that the Nebraska irrigated acreage has increased over 12,000 acres in the period 1930-1939, a period of drouth "unprecedented in length and severity" (R. 119). This increase in irrigated acreage taken together with the lack of any conclusive evidence of a drop in agricultural production (R. 90-91) shows that if Nebraska has been deprived of any water to which it is entitled—and Colorado denies that Nebraska has been so deprived of water—then the water was not needed and constitutes the basis for no claim of damage.

6. THE FACT THAT COLORADO HAS INJURED NO DOWNSTREAM WATER USER IS SHOWN BY THE INCREASE IN IRRIGATED ACREAGE IN THE DOWNSTREAM AREAS.

An important factor in determining whether or not an upstream area has so depleted the stream as to injure those below is an analysis of the irrigated acreage in the different areas. In the thirty-year period since the Pathfinder Reservoir of the North Platte Project went into operation, the irrigated acreage in Colorado has increased only 14 per cent while that of Wyoming increased 31 per cent

and that of Nebraska substantially 100 per cent.[9] We quote from the Report of the Master (p. 29):

"Excluding the Laramie basin, the acreages under irrigation in the three States at intervals of ten years from 1880 to 1939 were as nearly as they may be arrived at as follows:

	Colorado	Wyoming	Nebraska	Total
"1880.....	200	11,000	.....	11,200
1890.....	44,500	86,000	15,300	145,800
1900.....	83,500	169,100	105,690	358,290
1910.....	113,500	224,500	192,150	530,150
1920.....	129,140	265,375	306,930	701,445
1930.....	130,540	307,105	371,300	808,945
1939.....	131,810	325,720	383,355	840,885

"From these figures it will be seen that during the last thirty years, and since 1910, while the acreage irrigated in Colorado increased but 14 per cent, that of Wyoming increased 31 per cent, and that of Nebraska substantially 100 per cent."

On page 35 of his Report the Master discusses the Kendrick Project in Wyoming, the construction of which was undertaken after the institution of this suit. This development, which is not yet in operation, has for its primary purpose the irrigation of 66,000 acres of land in Natrona County, Wyoming. Beginning on page 36 the Master describes the Sutherland and Tri-County Projects in Nebraska, which likewise have been constructed during the pendency of this law suit. The Sutherland Project will furnish a supplemental water supply to 100,000 acres of land between North Platte and Kearney, Nebraska (R. 96). The Tri-County Project "is expected to conserve a water supply sufficient to bring under irrigation 205,000 additional acres within the Counties of Phelps, Kearney and Adams" (R. 36). On pages 36-37 the Master thus summarizes the situation regarding irrigated acreage as it will ex-

[9] Attention is directed to Colo. Exs. 116 and 117 appearing in the Appendix at pages 17 and 19. Ex. 116 is a graph showing the irrigated acreage in the states as shown by the United States Census Bureau up to and including 1930. The 1940 Census was not available at the time the exhibit was prepared. Ex. 117 is a similar graph based upon the results of the investigations of the Colorado Water Conservation Board.

ist after the Sutherland and Tri-County Projects are in operation:

> "With the completion of the Sutherland and Tri-County Projects and irrigation of the additional lands in contemplation, the acreages under irrigation in the three States from the North Platte and Platte rivers will be approximately as follows:

Colorado	131,800 acres	(12%)
Wyoming	325,720 acres	(29%)
Nebraska	653,355 acres	(59%)
Total	1,110,875	(100%)

The tables appearing above show clearly that during a thirty-year period while irrigation in Colorado was virtually stagnant Wyoming irrigated areas have increased about one-third and Nebraska irrigated areas have more than doubled. Even during the period of "unprecedented" drouth the irrigated acreage increased substantially. The only conclusion which can be drawn is that Colorado has not injured any downstream area.

The lack of injury is also established by the failure to utilize the available water supply. The existence of an unused supply of water in the North Platte is certainly shown by the fact that during the pendency of this suit the Kendrick Project in Wyoming for the irrigation of 66,000 acres and the Tri-County Project in Nebraska for the irrigation of 205,000 acres have been constructed. It is not conceivable that the United States Bureau of Reclamation would have constructed the Kendrick Project, costing over $19,000,000 (R. 35), or that the Federal Public Works Administration would have financed the $37,000,000 Tri-County Project (R. 36) if they had thought that the available water supply of the stream was entirely used by existing projects and that there was no available surplus.

Be this as it may, the Master's findings clearly disclose that there has been a usable but unused surplus. At pages 96 to 99 of his Report the Master considers the river sec-

tion from Kingsley Reservoir to Kearney, Nebraska, and states the following conclusion, (R. 99):

> "* * * it appear's manifest that if this section ever had any equitable claim upon water from the upper States the basis of such claim has been nullified by the supply of storage water now available from the reservoir system installed at the head of the section."[10]

At pages 92 to 95 the Master discusses the Tri-State Dam to Kingsley Reervoir section, and states (R. 92):

> * * * its canals are so well supplied from return flows and other local sources that the section may be omitted from any consideration of interstate distribution."

This is in accord with the Master's basic conclusion stated in paragraph 5 of page 9 that:

> "Lands in Nebraska supplied by diversions below the so-called Tri-State Dam have no equitable claim upon direct flow water originating in Wyoming or Colorado. This results from the fact that their needs are reasonably satisfied from local sources of supply."

The question is thus narrowed to a consideration of the supply available for the diversions at and above Tri-State Dam. At pages 95 to 96 the Master finds:

> "In the 1931-1940 period, with no limitation on Wyoming uses for the benefit of Nebraska, *the mean divertible flow passing Tri-State Dam for the May-September period was 81,700 feet.*"[11]

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[10] This statement is based upon the study of the United States witness Wright whose conclusions have not been disputed. Wright found an annual surplus of 126,813 acre-feet in this section, Kingsley Reservoir to Kearney (R. 98). This is the last irrigated section on the river. The amount of surplus found by Wright would have been substantially greater if he had used long-time rather than drouth period records for water supply.

[11] See also R. 64. The Master states that for the Whalen-Tri-State Dam Section the water studies of the states show the following seasonal excesses: Nebraska 325,000 acre-feet; Wyoming 294,700 acre-feet; Colorado 281,700 acre-feet. These figures show that, if the long-time average water supply rather than the drouth period supply is considered, the seasonal divertible supply passing the Tri-State Dam would have exceeded the 81,700 acre-foot amount found by the Master.

No party has filed any exception to this finding.

It would seem elementary that there is no ground for affirmative relief against Colorado when during a period which the Master has characterized as a drouth "unprecedented in length and severity" (R. 119), an average amount of 81,700 acre-feet of divertible water passed beyond the last stream section, which, under the findings of the Master sustained by overwhelming evidence, has any right to claim water from upstream areas. It would seem to be elementary that a State must use its locally available water supplies before it can assert any right to require water to be passed down to it from an upper state.[12]

7. IN THE ABSENCE OF ANY SHOWING THAT COLORADO HAS INJURED OR IMMEDIATELY THREATENS INJURY TO ANY DOWNSTREAM WATER USER THERE SHOULD BE NO AFFIRMATIVE RELIEF GRANTED AGAINST COLORADO.

In the many cases between states involving interstate waters this Court has announced certain controlling principles. The latest, and perhaps the most concise statement thereof is that found in *Colorado v. Kansas,* 320 U. S. 383, 393, 394, 64 S. Ct. 176, from which we quote:

> "In such disputes as this, the court is conscious of the great and serious caution with which it is necessary to approach the inquiry whether a case is proved. Not every matter which would warrant resort to equity by one citizen against another would justify our interference with the action of a state, for the burden on the complaining state is much greater than that generally required to be borne by private parties. Before the court will intervene the case must be of serious magnitude and fully and clearly proved. And in determining whether one state is using, or threatening to use, more than its equitable share of the benefits of a stream, all the factors which create equities in favor of one state or the other must be weighed as of the date when the controversy is mooted."

It is incumbent upon the states seeking relief, that is

[12] See *Wyoming v. Colorado,* 259 U. S. 419, 484.

Wyoming and Nebraska, to show by clear and convincing evidence their right to relief. *New York v. New Jersey,* 256 U. S. 296, 309, 41 S. Ct. 492, 496). This is a controversy between states and the burden and *quantum* of proof are governed accordingly *(Washington v. Oregon,* 297 U. S. 517, 529, 56 S. Ct. 540, 545,) The jurisdiction of this Court in respect of controversies between states will not be exerted in the absence of absolute necessity (*Alabama v. Arizona,* 291 U. S. 286, 91, 54 S. Ct. 399, 401). The oft quoted rule is, as stated in *Missouri v. Illinois,* 200 U. S. 496, 521, 26 S. Ct. 268, 270:

> "Before this Court ought to intervene, the case should be of serious magnitude, clearly and fully proved, and the principle to be applied should be one which the court is prepared deliberately to maintain against all considerations on the other side."

The burden upon Wyoming and Nebraska of sustaining their claims is much greater than that imposed upon the complainant in an ordinary suit between private parties *(North Dakota v. Minnesota,* 263 U. S. 365, 374, 44 S. Ct. 138, 139; *Connecticut v. Massachusetts,* 282 U. S. 660, 669, 51 S. Ct. 286).

8. THE MERE POSSIBILITY OF INCREASED WATER USES IN COLORADO IS NOT SUFFICIENT TO JUSTIFY ANY AFFIRMATIVE RELIEF AGAINST COLORADO.

Any increase in Colorado water uses is speculative and conjectural and represents no more than a possibility of the indefinite future. The Master has specifically stated that there is no "immediate" threat of further stream depletion by Colorado (R. 130).

A potential threat of injury is insufficient to justify an affirmative decree against a state.

The jurisdiction of this Court over a case of this nature is derived from Article III, Section 2, Clause 2 of the United States Constitution, which reads in part thus:

> "The judicial power shall extend * * * to controversies between two or more states * * *"

In discussing this constitutional provision the Court said in *Texas v. Florida*, 306 U. S. 398, 405, 59 S. Ct. 563:

> "So that our constitutional authority to hear the case and grant relief turns on the question of whether the issue framed by the pleadings constitutes a justiciable 'case' or 'controversy' within the meaning of the constitutional provision, and whether the facts alleged and found afford an adequate basis for relief according to the accepted doctrines of the common law or equity systems of jurisprudence, which are guides to decision of cases within the original jurisdiction of this Court."

Many years earlier in *Louisiana v. Texas*, 176 U. S. 1, 15, 20 S. Ct. 251, the Court declared:

> "But it is apparent that the jurisdiction is of so delicate and grave a character that it was not contemplated that it would be exercised save when the necessity was absolute and the matter in itself properly justiciable."

The Court will not grant relief against something feared as liable to occur at some future time. In *Alabama v. Arizona*, 291 U. S. 286, 291, 54 S. Ct. 399, it was said:

> "This Court may not be called upon to give advisory opinions or to pronounce declaratory judgment * * *. Its jurisdiction in respect of controversies between states will not be exerted in the absence of absolute necessity."

The rule that judicial power does not extend to the determination of abstract questions has been announced in numerous cases among which are *Ashwander v. Tennessee*, 297 U. S. 288, 324, 56 Ct. 466; *New York v. Illinois*, 274 U. S. 488, S. Ct. 661; and *United States v. West Virginia*, 295 U. S. 463, 55 S. Ct. 789. For there to be a justiciable controversy it must appear that the complaining state has suffered a loss through the action of the other state, furnishing claim for judicial redress, or asserts a right which is susceptible of judicial enforcement according to the ac-

cepted principles of jurisprudence (*Massachusetts v. Missouri*, 308 U. S. 1, 16, 60 S. Ct. 39).

The mere fact that a state is a plaintiff is not enough (*Florida v. Mellon*, 273 U. S. 12, 16, 47 S. Ct. 265). An injunction will issue to prevent existing or presently threatened injuries but will not be granted against something merely feared as liable to occur at some indefinite time in the future (*Connecticut v. Massachusetts*, 282 U. S. 660, 674, 51 S. Ct. 286).

This court has repeatedly said that it will not issue declaratory decrees (See *Arizona v. California*, 283 U. S. 423, 463, 51 S. Ct. 522, *United States v. West Virginia*, 295 U. S. 463, 474, 55 S. Ct. 789, *Alabama v. Arizona*, 291 U. S. 286, 291, 54 S. Ct. 399, *Massachusetts v. Missouri*, 308 U. S. 1, 15, 60 S. Ct. 39).

Inchoate rights dependent upon possible future development furnish no basis for a decree in an interstate suit. This was established in *Arizona v. California*, 283 U. S. 423, 462, 57 S. Ct. 522, 528. Arizona sought relief against the threatened invasion of its alleged rights to prohibit and prevent appropriation under its laws of the unappropriated waters of the Colorado River flowing within the state. This Court held that the contention could not prevail because it was based upon as assumed potential invasion of Arizona rights to interstate or local waters which had not yet been, and which might never be apportioned.

In the later case of *Arizona v. California*. 298 U. S. 558, 56 S. Ct. 848, Arizona again sought a decree apportioning among the States of the Colorado River the unappropriated water of the river. This Court in dismissing the bill held that under the facts alleged there could be no adjudication of rights in the unappropriated waters of the Colorado river without the presence in the suit of the United States. The Court concluded this opinion with this statement (298 U. S. 572, 56 S. Ct. 855):

"We leave undecided the question whether an

equitable division of the unappropriated water of the river can be decreed in a suit in which the United States and the interested states are parties."

While this statement apparently leaves the question open, it must be remembered that the Colorado river is navigable and that by the Boulder Canyon Project Act [13] the United States has undertaken, in the asserted exercise of its authority to control navigation, to impound and control the disposition of the unappropriated surplus water of the river (298 U. S. 570). Hence in that case the presence of the United States as a party was essential. In the case at bar the stream is non-navigable and there is no federal act whereby the United States may assert authority over the river. As heretofore stated, this Court has repeatedly held that it will not issue declaratory decrees. A decision which attempts to apportion between states rights of use which have not attached is clearly and unmistakably a declaratory judgment. *The apportionment of inchoate rights by court decree will create a multitude of unknown hazards.* A Court deals with actualities, not with unpredictable future possibilities. In spite of the application of the best available knowledge on economic and engineering matters future development may nevertheless, contrarily, take a different line than that determined by a Court.

In other words, as a result of human ingenuity and energy there may be a development in one state which puts to beneficial use water which by decree operating *in futuro* has been apportioned to another state. It would seem clear that there should be no decree which will permit water to flow out of the basin unused merely because the Court allotted it to a state which cannot use it.

9. THE MASTER IN MAKING HIS CONCLUSIONS AND RECOMMENDATIONS HAS ERRED IN NOT FOLLOWING THE RULES APPLICABLE TO SUITS BETWEEN STATES.

In the section of his report entitled "Law of the Case," and appearing at pages 106-113, the Master discusses many of the rules applicable to interstate suits and suggests that

[13] Act of December 21, 1928, 45 Stat. 1057, 43 U. S. C. A. 617.

there are three possible points of distinction between this case and those covered by the rule establishing as prerequisites of relief, invasion of rights, resulting injury of great magnitude and clear and convincing proof. These three points of distinction appear to be (R. 110-113):

1. Exception to and modification of the rule are established by *Wyoming v. Colorado,* 259 U. S. 419, in cases involving disputes over interstate waters where the affected states have adopted the rule of priority and this rule is violated by one of them.

2. In their pleadings all parties ask for equitable apportionment and this necessarily implies consent to injunction restraining water uses contrary to the terms of apportionment.

3. Unique factors are presented by (a) appropriations and diversions in Wyoming for the benefit of Nebraska; (b) physical control by Wyoming or the United States of diversion works in Wyoming regulating distribution of water to Nebraska users; (c) joint use of canals supplying lands in both states, and (d) concentration of requirement for both states in the short Whalen-Tri-State Dam Section.

The third of the Master's points of distinction mentioned above is no concern of Colorado and hence can have no applicability in determining whether or not affirmative relief should be granted against Colorado. Accordingly, we will be concerned only with the first two alleged points of distinction.

(a) Wyoming v. Colorado Is Not an Exception to the General Rule.

In its recent decision in *Colorado v. Kansas,* 320 U. S. 383, 64 S. Ct. 176, the Court considered whether or not *Wyoming v. Colorado* constituted an exception to the general rule. After referring (320 U. S. 391) to its former decision in *Kansas v. Colorado,* wherein it held that if Kansas were later to be accorded relief "she must show additional takings working serious injury to her substantial interests," the Court stated that this was in accord with

other decisions in similar controversies (320 U. S. 392) and in a footnote pointed out that:

> "*State of Wyoming v. Colorado,* 259 U. S. 419, 42 S. Ct. 552, 66 L. Ed. 999, is not an exception. As it happened, the doctrine of appropriation had always prevailed in each of the states there concerned and furnished the most appropriate and accurate measure of their respective rights of appropriation of the flow of the Laramie River. It was, therefore, possible in enforcing equitable apportionment, to limit the amount of water which Colorado might, without injury to Wyoming's interests, divert to another water shed, to an amount not exceeding the unappropriated flow."

It would seem that the Court has now put at rest for all time the erroneous concept that a different set of rules applies in original interstate actions over interstate waters between states applying the priority doctrine.

Since the decision in *Wyoming v. Colorado* has provoked so much discussion, it will be appropriate to refer to it briefly. The case involved the Laramie River, a nonnavigable tributary of the North Platte. The Laramie rises in Colorado and flows some 27 miles in that state and then crosses into Wyoming to join the North Platte at Fort Laramie, a short distance below Whalen. A Colorado corporation constructed facilities, including a tunnel, for the designed purpose of taking 50,000 acre-feet of water a year out of the Laramie River basin for irrigation uses in the Cache la Poudre basin of Colorado. Wyoming sued to enjoin the proposed diversions upon the ground, among other things, that the water proposed to be exported from the basin was needed to supply prior and superior rights in Wyoming. While it is true that the Court did not in so many words describe the effect on Wyoming as a serious injury to its substantial interests, it is clear that the Court concluded that such would be the effect. The Court made a careful analysis of the available water supply which it found to be 288,000 acre-feet anually and said that the amount covered by senior appropriations was 272,500 acre-

feet (259 U. S. 496). Accordingly, it granted an injunction against the diversion of more than 15,500 acre-feet annually by means of the Colorado exportation project. The decree which was entered went beyond this and, as modified on rehearing (260 U. S. 1), stated that the decree should not prejudice the right of Colorado to continue to exercise certain other existing rights, both for the exportation of water and for the irrigation of land within the basin. The interested parties had difficulty in agreeing upon the interpretation and effect of the decree and controversies over it resulted in three subsequent decisions of this Court (286 U. S. 494, 52 S. Ct. 621; 298 U. S. 573, 56 S. Ct. 912; and 309 U. S. 572, 60 S. Ct. 765). In its last decision the Court stated positively that the intent of its decision was to determine the relative rights of the two states and not to be an adjudication of the relative rights of the decreed appropriations in Colorado.

It is submitted that there is absolutely no logical basis for the assertion that a different rule applies in a case such as the one at bar from the general rules applicable in other types of interstate litigation. In all cases the constitutional powers of the Court are derived from the same source. There is no provision of the United States Constitution which says that states having the priority doctrine of water law are to be treated differently than states which apply the riparian or some other doctrine. For relief to be granted there must be a justiciable controversy in any event.

Attention is directed to the fact that in *Connecticut v. Massachusetts,* 282 U. S. 660, 51 S. Ct. 286, the Court considered an interstate dispute over the waters of the Connecticut river. Each state applied the riparian doctrine of water law. Relief was denied upon the ground that no serious injury to substantial interests was shown by clear and convincing evidence. In *Kansas v. Colorado,* 206 U. S. 46, 27 S. Ct. 655, and *Colorado v. Kansas,* 320 U. S. 383, 64 S. Ct. 176, the Court considered an interstate dispute over the waters of the Arkansas river between states, one of which applied the appropriation and one the riparian doctrine, and relief was denied because the necessary prerequisites stated

above had not been satisfied. In *Washington v. Oregon*, 297 U. S. 517, 56 S. Ct. 540, the Court considered a dispute over the waters of the Walla Walla river between states, each of which, so far as that stream and the affected area were concerned, applied the doctrine of prior appropriation, and the Court denied relief because the complainant state failed to make the necessary showing required under the general rules stated above.

There is absolutely no reason for not applying these general principles to controversies involving the North Platte basin. That river basin and the states which compose it are governed by the same constitution as are the other parts of the United States. There is certainly nothing which differentiates the North Platte basin from other areas.

(b) The Pleadings in the Case at Bar Do Not Justify Any Relaxation of General Principles.

The second point of distinction made by the Master is that in their pleadings all the parties seek equitable apportionment and after the close of the evidence all the parties except Colorado still urge apportionment. The Master states (R. 111):

> "This demand for apportionment would appear necessarily to contemplate and imply consent to injunction restraining diversions of use of water contrary to the terms of apportionment."

It is true that Colorado prayed for an equitable apportionment.[14] Prayer of a complaint is no part of a pleading. It states merely the request of a party. Colorado, since the closing of the Nebraska case in chief has consistently and affirmatively asserted its contention that the case against it should be dismissed because of the absence of a showing sufficient to entitle any other party to relief against Colorado under the applicable rules announced by

[14] Original interstate cases are not to be decided upon mere technical principles of pleading, *Rhode Island v. Massachusetts*, 14 Pet. 210-257, 10 L. Ed. 423-445. See also *Virginia v. West Virginia*, 220 U. S. 1, 31 S. Ct. 331.

this Court. *Colorado does not directly or by any implication consent to an injunctive decree against it.* It is extremely doubtful that the executive state officials could consent to an injunctive decree against Colorado which would have the effect of impairing its quasi-soyereignty.[15] Only the Colorado legislature can do this.

Attention is further directed to the fact that in *Coloradio v. Kansas,* 320 U. S. 383, 56 S. Ct. 176, both parties prayed for an equitable apportionment and those prayers were both denied. (See 320 U. S. 400, 322 U. S. 708).

10. THE MASTER HAS MISCONCEIVED THE MEANING OF THE RULE OF EQUITABLE APPORTIONMENT.

The Master seems to have been imbued with the idea that an affirmative decree should be entered because of the fact that the four parties have presented to the Court a complex problem which needs solution. As indicated by his discussion under the heading "Problems presented by the 'dry cycle' and other uncertainties-alternatives respecting decree," appearing at pages 119-123, he considers that there are two alternatives: First, the dismissal of the case, and Second, the entry of a decree based on present conditions with retention of jurisdiction to modify upon a change of conditions. The Master comments (R. 122) that a dismissal of the suit, which would have the effect of rendering fruitless the time, learning, and effort devoted to the presentation of the evidence in the case, is "clearly not recommendable." In arriving at such a conclusion the Master misapprehends the rule of equitable apportionment.

The principle of equitable apportionment, first stated by this Court in *Kansas v. Colorado,* 206 U. S. 46, 100, 117, was thus eluciated in *Connecticut v. Massachusetts,* 282 U. S. 660, 670:

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[15] On this point there is no controlling decision of the United States Supreme Court which we have been able to find. The question of the settlement of interstate water controversies through consent to the entry of a particular decree by the United States Supreme Court has been much debated in the West. Such a procedure would permit the circumvention of a State Legislature from which approval of a compact might be unobtainable because of conflicting interests. Attention is directed to the decision in *Florida v. Georgia,* 17 How. 478, 15 L. Ed. 181, 190.

"For the decision of suits between states, federal, state and international law are considered and applied by this Court as the exigencies of the particular case may require. The determination of the relative rights of contending states in respect to the use of streams flowing through them does not depend upon the same considerations and is not governed by the same rules of law that are applied in such states for the solution of similar questions of private right. * * * And, while the municipal law relating to like questions between individuals is to be taken into account, it is not to be deemed to have controlling weight. As was shown in *Kansas v. Colorado,* 206 U. S. 46, 100 (27 S. Ct. 655, 51 L. Ed. 956), such disputes are to be settled on the basis of equality of right. But this is not to say that there must be an equal division of the waters of an interstate stream among the states through which it flows. It means that the principles of right and equity shall be applied having regard to the 'equal level or plane on which all the states stand, in point of power and right under our constitutional system,' and that, upon a consideration of the pertinent laws of the contending states and all other relevant facts, this Court will determine what is an equitable apportionment of the use of such waters."

An apt comment on the rule was made in *New Jersey v. New York,* 283 U. S. 336, 342, 51 S. Ct. 478, from which we quote:

"Both states have real and substantial interests in the river that must be reconciled as best they may be. The different traditions and practices in different parts of the country may lead to varying results but the effort always is to secure an equitable apportionment without quibbling over formulas."

Apparently the Master's theory is that since the three states and the United States have come to the Supreme Court of the United States with their dispute over the water of the North Platte river, the Court will, by reason

of the existence of a dispute, enter a decree of equitable apportionment. This would be in effect the writing of a compact for the states and the Court has stated definitely that this it will not do. In the original *Kansas v. Colorado* case the Court remarked that Colorado could not be upheld in appropriating the entire flow of the river upon the ground that it was giving to Kansas something of equal value, and said (206 U. S. 100):

> "That would be equivalent to this Court's making a contract between the two states and that it is not authorized to do."

It is respectfuly submitted that a decree of equitable apportionment made in the absence of a showing by clear and convincing evidence of a serious injury to substantial interests is patently the making of an interstate compact through the use of the judicial rather than the legislative processes.[16]

An effective decree of equitable apportionment requires the imposition upon the upstream state of some restriction or limitation. Colorado is a state of the Union and is on an equality with all other states. Except for those powers delegated to the federal government the jurisdiction of each state within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it deriving validity from an external source would imply a diminution of its quasi-sovereignty to the extent of the restriction and an increase of quasi-sovereignty to the same extent in that state which would impose such restriction. The rule has

[16] During the arguments before the Master the other parties asserted that the position taken by Colorado that no affirmative decree will be entered in the absence of a showing of serious injury constitutes an attack on the jurisdiction of the Court. It is true that in *Cohens v. Virginia*, 6 Wheat. 264, 378, 5 L. Ed. 257, 285, the Court said that if the states are parties it is unimportant what may be the subject of the controversy but that decision does not militate against the Colorado contention that (1) there must be a controversy, (2) the right of a complainant state to relief against another state is determined by different rules than is the right of a litigant to relief in a private suit, and (3) the action of a state will not be controlled upon the suit of another state in the absence of a showing by convincing evidence of a serious injury.

been stated that all exceptions to the full and complete power of a nation within its own territory must be traced to the consent of the nation itself (*Schooner Exchange v. McFadden,* 7 Cranch 116, 136, 3 L. Ed. 287, 293). Recogniz- of course, the supremacy of the federal government as to the powers delegated to it, the same rule applies to the states of the union. Admittedly the states are only quasi-sovereignties and by the decisions of this Court, each is entitled only to its equitable share of the benefits of the flow of an interstate stream. Since the states may not make war, this equitable apportionment may be accomplished only by a compact made with the approval of Congress or by a decision of the United States Supreme Court. While a state may by compact, approved by Congress, voluntarily restrict or limit the use of water, yet this same restriction or limitation may not be forcibly imposed by court decree in the absence of a clear showing or serious and substantial injury. Otherwise, the equality of the states would be destroyed.

Any apportionment between states of the waters of an interstate stream which may be made (and Colorado denies that one should be made in this case) must necessarily impose some restriction or limitation on the upper state in order to be effective. This results from the elementary fact that water flows downhill. The imposition of a condition on a lower state is ineffective to produce any apportionment of streamflow. Whatever limitations or restrictions are placed upon an upper state amount actually to the impairment of the quasi-sovereignty of that state. When an apportionment is made by action of this Court, the limitations and restrictions on the upper state are imposed involuntarily by a greater power, the Court. Because such limitations and restrictions constitute an actual infringement on the quasi-sovereign powers of the state, the Court has always been most reluctant to control the acts and powers of a state. This principle was forcibly expounded in the recent *Colorado v. Kansas* decision wherein the Court said (320 U. S. 392):

"The reason for judicial caution in adjudicating

the relative rights of states in such cases is that, while we have jurisdiction of such disputes, they involve the interests of quasi-sovereigns, present complicated and delicate questions, and, due to the possibility of future change of conditions, necessitate expert administration rather than judicial imposition of a hard and fast rule. Such controversies may appropriately be composed by negotiation and agreement, pursuant to the compact clause of the Federal Constitution. We say of this case, as the court has said of interstate differences of like nature, that such mutual accommodation and agreement should, if possible, be the medium of settlement, instead of invocation of our adjudicatory power.

"It follows that the Master erred in attempting to divide what he designated as the 'average annual dependable' water supply of the Arkansas river in Colorado into fractions and awarding those fractions to the states respectively. *Such a controversy as is here presented is not to be determined as if it were one between two private riparian proprietors or appropriators.*"

The Master in concluding his discussion under the heading "Colorado Apportionment" at pages 125-133 of his Report, says that there are three alternatives in regard to Colorado: First, an outright dismissal; Second, denial of present relief with retention of jurisdiction to grant relief on a change of conditions; Third, imposition of a limitation on present uses with retention of jurisdiction for modification in the event the water supply justifies further expansion of irrigation. And then the Master states (R. 132):

"A reasonable argument can be made for any of these three alternatives."

In making this statement the Master erred. There is no reasonable ground for either of the last two alternatives unless there is a showing by clear convincing evidence of a serious injury to substantial interests. The Master has made no finding of such injury. None of the parties have

excepted to his failure to make such a finding. Under the circumstances there is no alternative. Colorado is entitled to a judgment of dismissal.

II.

THE RECOMMENDED INJUNCTIVE DEGREE AGAINST THE STATE OF COLORADO IS IMPROPER.

1. ERRORS IN THE FORM OF THE RECOMMENDED INJUNCTIVE DEGREE.

In paragraph 1 on page 177 of his Report the Master recommends the entry of a decree:

> "Enjoining Colorado (a) from the diversion of water for the irrigation in North Park of more than 135,000 acres of land, (b) from the accumulation in storage facilities in North Park of more than 17,000 acre-feet of water between October 1 of any year and September 30 of the following year, and (c) from the transbasin diversion out of North Park of more than 6,000 acre-feet of water between October 1 of any year and September 30 of the following year."

The evident intent of the Master is to limit Colorado to existing uses (See R. 9, 128, 132-133).

If the Court should hold against Colorado in its contention that it is entitled to a judgment of dismissal, then regard should be had for two technicalities wherein the Master has perhaps inadvertently erred. These are:

First. The reference in the recommended decretal provision is to North Park. The area of North Park is not coterminous with Jackson County, Colorado.[17] All of Jackson County is in the North Platte basin but Jackson County embraces areas, principally in the basins of Big Creek and the Encampment river, which are not within North Park. There is irrigation in these areas as is shown by Colo. Ex. 58, App. p. 7.

Second. The restriction on transbasin diversions is 6,000 acre-feet a year. The uncontradicted testimony is that the facilities for these diversions are such that the aver-

[17] The Master recognizes this at page 16 of his Report.

age annual diversion is 6,000 acre-feet. Annual diversions in the past have exceeded 6,000 acre-feet. Tr. 22165, App. p. 40). If an annual limitation of 6,000 acre-feet is imposed, it will be impossible for such exportations in the future to average that amount. No doubt the Master inadvertently substituted an average figure for an annual figure. In order to comply with the expressed intent of the Master not to interfere with existing Colorado uses, it would be necessary to enjoin Colorado exportations in excess of an average of 6,000 acre-feet computed over a period of ten or more years.

2. THE RECOMMENDATION IS MADE UPON THE ASSUMPTION THAT AN APPORTIONMENT SHOULD NOW BE MADE UPON THE BASIS OF DROUTH CONDITIONS WHICH HAVE ASSERTEDLY EXISTED SINCE 1930. THIS IS INEQUITABLE.

(a) An Assumption That an Abnormal Drouth Condition Will Continue Is Wholly Speculative and Conjectural.

The Master has characterized the recent drouth period (R. 119) as "unprecedented in length and severity." With reference to whether an allocation of water should be based upon drouth conditions of the 1931-1940 period or upon the 1904-1940 period, the Master says (R. 119):

> "Any conclusion would have to be largely arbitrary. Logically, it would either have to be based on the dry cycle on the theory that that cycle has become so extended that it must be accepted as a new normal, unless and until there is an emergence from it, or it would have to ignore the dry cycle as a transitory phenomenon and be based on the preceding history of supply. *Either assumption would be speculative and poorly justified.*"

In spite of his admission that any conclusion is "arbitrary" and that any assumption is "speculative and poorly justified," the Master proceeds to recommend a decree against Colorado which limits its uses to those made during the "dry cycle" (See R. 132-133). Since the Master himself recognizes that the conclusion is arbitrary and the assumption speculative, it would seem that no argument on this point is necessary. In this connection it should be noted

that the condition existing along the North Platte was not peculiar to that stream but was common to all streams which head in the Colorado area. Attention is directed to Colo. Ex. 28 (App. p. 5), which is a comparative graph of the runoff of all streams having their source in this area. It is impossible for man either to control nature or to prophesy with any accuracy climatic trends. *It is just as reasonable to assume that there will be a return to former climatic conditions as it is to assume that the drouth will continue indefinitely.*[18]

The recommendation that the Court retain jurisdiction for modification of the decree upon a change in climate conditions is not an acceptable or satisfactory solution. No one knows the year in which a dry cycle ends and a wet cycle begin. If Colorado should decide that there is such a change in climatic conditions as to justify a relaxation of the limitations placed upon it, proceedings would have

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[18] Colorado witness Patterson testified as follows (Tr. 21943, 21944, App. p. 38):

"* * * the North Platte river * * * has been affected by the same cycle of deficiency precipitation that has caused declines in the flow of all of the adjoining and neighboring streams. Of course, in all of these studies the objective is to try to forecast what another cycle of years in the future may show in the way of water production and stream flow runoff. While no one may forecast with certainty what the climactic conditions will be during the next year or the next decade or during a coming period of 45 years, still we believe that it is reasonable to assume that in general the history of natural phenomenon will repeat itself. On such an assumption, whether we realize it or not, all our present long-time investments are being made. In our opinion, there is as much assurance that natural and undeveloped streamflows during the next 45 years will be greater than they were during the past 45 years as there is to forecast the reverse condition. Certainly there is no recorded experience except the fact that previous drought cycles have been followed by more normal conditions. On the basis of that recorded experience it would seem reasonable to assume that the present deficiency will pass and be followed by more normal precipitation and streamflow conditions.

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"When I say recorded experience I have in mind not only these streamflow records that are here portrayed over a 45-year period but I also have in mind the somewhat longer precipitation records over the West, some of which are 75 years or more of duration; and while there are records of extremely low precipitation in any given year that are quite common to all the western stations, and in some instances from the successions of two or three years of that aggregate, still I believe it is true that never before have we had one that has extended as many years as the nine years involved in this present cycle of drought."

to be brought in this Court, and, if their determination took as long as this present case has, the wet cycle would end and another dry cycle begin before the matter might be determined.

(b) Equity Between the Various River Sections Requires That Water Shortages Should Not Be Imposed Unproportionately Upon Any One Section.

In the Colorado section of the North Platte basin the mean precipitation during the growing season is 2.35 inches. At Mitchell, Nebraska it is 8.64 inches. Water shortages in Jackson County, Colorado are chronic (Tr. 22861, App. 22862). In Nebraska there is, according to the finding of the Master, no unequivocal evidence of serious drouth damage since 1931 (R. 90-91). The Master computes requirements for the canals in the Whalen-Tri-State Dam area, which to say the least are on the liberal side, and which will supply fully the diversions of the 1931-1940 drouth period when the region was so well served that, as stated by the Master, the statistics of crop production are "inconclusive as to the existence or extent of damage to Nebraska by reason of the drouth." (R. 91).

In other words, the critical Whalen-Tri-State Dam section will be afforded a full water supply ideally distributed while limitations will be imposed upon the Colorado area. It would seem logical and fair that any decree defining the rights of the states should be based upon average, usable water supplies with due regard to storage possibilities and not upon conditions existing during a drouth period.[19] It is obvious that the only possible protection

[19] In *Wyoming v. Colorado*, 259 U. S. 419, 480, the Court said:

"But we are of opinion that the computation and conclusion of the witness, even when revised in the way we have indicated are based, too much on the average flow, and not enough on the unalterable need for a supply which is fairly constant and dependable, *or is susceptible of being made so by storage and conservation within practicable limits.* By this it is not meant that known conditions must be such as give assurance that there will be no deficiency even during long periods, but rather that a supply which is likely to be intermittent, or to be materially deficient at relatively short intervals, does not meet the test of practical availability. As we understand it, substantial stability in the supply is essential to successful reclamation and irrigation."

against drouth is the storage of water. The Master takes this protection away from Colorado when he limits the storage of water to 17,000 acre-feet annually. There are in the Colorado portion of the basin reservoir sites which can be used for the storage of water.[20] Surely the future development of these reservoir sites to reduce in some measure the chronic shortages in North Park should not be forbidden by a decree awarding a full water supply ideally distributed to the downstream areas.

In this connection attention is directed to one interesting point. The Master bases his water requirement of the Fort Laramie Canal of the North Platte Project upon a delivery rate to the land at 1.65 acre-feet per acre (R. 203), and for the Interstate Canal of the same project a rate of either 1.75 or 1.8 acre-feet per acre (R. 210). These rates, he states, are liberal rather than conservative.

Barry Dibble, the engineer who presented the water study upon which the United States relies, testified as follows (Tr. 29,106-29,107, App. p. 59):

> "Climatic conditions materially affect the use of irrigation water from year to year. 1941 is illustrative of that. The deliveries to the land of irrigation water have been relatively small in 1941—on the North Platte Project, I believe, .9 of an acre-foot per acre—and yet the project was in position to accumulate some storage. They did not use all the storage water from the North Platte Reservoir during 1941."

In other words, in the good water year of 1941, the deliveries to the land under the Interstate Canal were exactly half the requirement of the Master. It seems utterly inequitable in such a year as that to curtail water uses in an upstream area. *If the recommended decree goes into effect, it is suggested that the result will be to enhance the full supply of downstream areas, while maintaining by force of law a condition of chronic deficiencies in the upstream sections of the basin.*

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[20] See testimony of Patterson (Tr. 22429-22430, 22430-22431, 22433-22434, App. p. 48, and 22438-22439, App. p. 49, and Colo. Ex. 58, App. p. 7).

(c) The Effect of the Recommendation Is to Allocate Surplus Water Supplies Available Under Normal Conditions to the Downstream Areas.

The recommendation of the Master imposes rigid limitations upon the Colorado area. No limitation whatsoever is placed upon the Whalen-Tri-State Dam section. The result of such a decree will be to prevent all future upstream development and to permit expansion downstream. It is submitted that equity requires that opportunities for expansion should be afforded all river sections.

The only way Colorado might secure the removal of the limitation would be by showing that conditions in the basin had changed so that a greater water supply was available. The time when it might do this is uncertain. Would it require a succession of three wet years or a succession of ten wet years to sustain the burden of proof? Any answer would at this time be purely speculative. Meanwhile with additional water going downstream, it is reasonable to expect that additional development would take place, and when Colorado made its application upon the basis of change of conditions, it would be met with a claim that there were already in existence new developments downstream dependent upon the use of this additional supply and that, since they were already in existence, their water supply should not be taken from them. Under the rule that existing economic development will be protected whenever possible,[21] the Colorado claim would in all probability be denied. Hence, the recommendation of the Master is most patently a limitation on Colorado for all time to the uses

[21] See *Washington v. Oregon*, 297 U. S. 517, 529, 56 S. Ct. 540. The rule that existing economic development will be protected and preserved whenever possible does not mean that as between states, each of which applies the priority doctrine, rights should be determined upon a basis of priorities regardless of state lines. The method of granting priority dates differs in every state as does also the date within which a project must be completed after its initiation. For example, in the case under consideration the Nebraska Tri-State Project and the Wyoming Wheatland Project each came to its full development many years after the date awarded it for priority purposes. See R. 234-238 for Tri-State Project, and R. 269-271 for the Wheatland Project. The liberality of the state officials in connection with these priorities may be contrasted with the attitude of this Court in *Wyoming v. Colorado* (See 259 U. S. 490-495).

which Colorado made of the North Platte water during a cycle of unprecedented drouth.

(d) The Recommendation of the Master Ignores the Additional Storage Capacity Afforded by Seminoe and Alcova Reservoirs.

During the pendency of this suit the United States Bureau of Reclamation has constructed Seminoe Reservoir with a capacity of 1,024,000 acre-feet and Alcova Reservoir with a capacity of 190,500 acre-feet. The effect which the operation of these reservoirs will have upon the regimen of the stream is as yet unknown. The Master has commented (R. 32-34) on the effect of the North Platte Project which utilized for the storage of water the Pathfinder Reservoir with a capacity of 1,045,000 acre-feet. This storage capacity is now more than doubled. It is to be expected that the additional capacity will be utilized so as to conserve to the best of human ability all surplus flows of the stream. When this is done the effect may be even greater than was the effect of Pathfinder. Yet this factor is wholly ignored by the Master and a decree freezing upstream rights to those now existing is recommended for entry without any provision being made for its relaxation in the event the efficient operation of the new storage facilities results in the storage of a greater amount of water than that needed for existing and presently planned downstream development.

3. THE DEFINITION OF APPORTIONMENT TO COLORADO IS UNFAIR

The Master limits Colorado to the irrigation of 135,000 acres of land in the North Platte basin. This is in accord with Colorado testimony as to the extent of the presently irrigated land. However, Colorado testimony, as the Master himself recognizes (R. 44-45), is to the effect that an additional 30,390 acres are irrigable under constructed ditch systems. This acreage is land on which water has been applied, but which was not irrigated at the time of the Colorado study. If this acreage were added to that allotted by the Master the total of 165,000 acres would be but slightly in excess of the 1940 census figures of irrigated

acreage in Jackson County, Colorado. The census figure was 154,279.[22] (See U. S. Ex. 204-B, App. p. 25.) It seems unfair to Colorado to have a limitation imposed upon it for all times which would deprive it of the right to irrigate land which is susceptible of irrigation under existing facilities and which except for the drouth conditions would in all probablity have been irrigated during the 1931-1940 decade. Colorado witness Patterson pointed out that there is in Jackson County at the present time a definite shortage of summer pasture due to recent federal regulations pertaining to the use of the National Forest and that even though normal rainfall conditions should recur, the number of livestock permitted to graze in the National Forest may never again be as great as previously because of regulations (Tr. 22368-22370, App. p. 44). In other words if Jackson County is to maintain its livestock industry to the same extent as it has in the past it will have to develop this additional summer pasture and it cannot do this without increasing its irrigated acreage. The decree of the Master would prevent this and hence handicap the principal industry of Jackson County. Finally in this connection, attention is directed to the testimony of witness Patterson that under natural conditions existing in Jackson County prior to the coming of the white man and the introduction of irrigation, the conditions were such that in all probability the same amount of water was consumed then as is now consumed by irrigation. At the present time in Jackson County the streams are confined to definite channels and the willows covering low lands have been reduced so far as possible. Under natural conditions flooding caused by beaver ponds and the unrestricted growth of the willows "probably consumed as much or more water than the same land today is consuming" (Tr. 22,335-22,339, App. p. 41).

In other words, water consumption in North Park now

[22] The discrepancy between the 1940 Census figure and the finding of the Master as to irrigated acreage causes Colorado some apprehension. Frankly, Colorado, as shown by the testimony of its witnesses, believes the census figure too high. If the recommendation of the Master is followed and the future census reports indicate a higher irrigated acreage, such reports will in all probability be used against Colorado in an endeavor to prove a violation of the decree.

is, in Mr. Patterson's opinion, no greater than it was under primitive conditions. What this means is that if irrigation were stopped in North Park and the area converted to a wildlife refuge, there would be no resulting increase in water supplies for downstream areas.

A substantial livestock industry has developed in North Park in the past 65 years. A rugged, self-reliant and self-sufficient civilization is based upon it. There is no reason why such economic development should not be encouraged rather than restricted and limited. *North Park has been the recipient of no benefits from the construction of enormous federal irrigation projects.* Its future growth and development should not be handicapped for the supposed but unproved benefit of downstream federally financed irrigation developments.

4. THE EFFECT OF THE RECOMMENDATION IS TO DISTURB THE RELATIONSHIP BETWEEN COLORADO WATER USERS.

The allocation between states of the flow of an interstate stream always presents a perplexing problem so far as its effect upon the relative rights within a state are concerned. The Master imposes three limitations upon Colorado:

1. As to the extent of the irrigated acreage.

2. As to the amount of water which may be stored annually.

3. As to the amount of water which may be exported annually.

The persons entitled to irrigate land, store water, or export water are dependent upon rights under Colorado law. A Court decree in line with the recommendation of the Master would necessarily disturb such rights. For example, the companies which export water have appropriation rights permitting them to take an amount of water measured in second feet when that water is available in the stream under their priority dates. Such diversions produce a variable amount in acre-feet, dependent upon the length

of time that the ditches can run. If water is available in excess of 6,000 acre-feet a year the appropriators will assert the right to take such excess upon the theory that they are entitled to it under Colorado law, and that the limitation upon Colorado for the benefit of the downstream areas must fall first upon the most junior right. In all probability the Colorado Court would sustain such a position. As an example of how a decree such as that recommended may cause confusion, we refer to the last three decisions of this Court in the Laramie river case,[23] and particularly to *Wyoming v. Colorado*, 309 U. S. 572.

We mention this matter because it emphasizes the difficulties attendant upon the enforcement of a court decree for equitable apportionment.[24] Obviously such difficulty may be avoided by compact, if through agreements between local water users in a state and subsequent agreement with the other state, consented to by Congress, an adequate and workable method of both water division and water administration may be worked out. A Court decree on the other hand is an inflexible thing which does not readily lend itself to fair and just administration under the variable climatic conditions which no man can foresee. It is submitted that in these interstate water suits an affirmative decree should never be entered unless there is a showing of a serious injury to substantial interests and that then it should be confined to a remedy for such injury.

When the Court goes beyond that point and endeavors to settle for all time questions of water allocation, it is undertaking a task wherein the wisest judgment of today may prove unfitting to the unpredictable conditions of tomorrow.

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[23] *Wyoming v. Colorado*, 286 U. S. 494; 298 U. S. 573; 309 U. S. 572.

[24] These difficulties are even greater in connection with the apportionment between Wyoming and Nebraska. For example, the Wyoming private canals between Whalen and the State Line have priority rights under Wyoming law and the so-called State Line Canals have priority rights under Nebraska law. Each of these canals will, no doubt, assert its priority rights under the law of its state without any regard to the requirements set up by the Master.

III.

THE MASTER HAS IGNORED THE PROVISIONS OF THE ACT OF CONGRESS APPROPRIATING FUNDS FOR THE CONSTRUCTION OF THE KENDRICK PROJECT.

Without conceding that any limitation should be placed upon Colorado and without in any way waiving any of the Colorado exceptions or arguments, attention is directed to the failure of the Master to recognize and give effect to the Act of August 9, 1937, which appropriated funds for the construction of the Kendrick Project in Wyoming. This Act reads in part as follows (50 Stat. 595):

> "Provided, That in recognition of the respective rights of both the States of Colorado and Wyoming to the amicable use of the waters of the North Platte River, neither the construction, maintenance, nor operation of said (Kendrick) project shall ever interfere with the present vested rights or the fullest use hereafter for all beneficial purposes of the waters of said stream or any of its tributaries within the drainage basin thereof in Jackson County, in the State of Colorado, and the Secretary of the Interior is hereby authorized and directed to reserve the power by contract to enforce such provisions at all times."

Nowhere in the Report of the Master is any reference made to this federal statute.

After the construction of Pathfinder Reservoir the United States Government, through various agencies, defeated the construction of North Park projects by denying rights of way across public lands and by denying Carey Act [25] applications. (See Tr. 22444-22446, App. p. 50.) After preventing this Colorado development the federal government then proposed for construction the Kendrick Project with Seminoe Reservoir, of a capacity of over 1,000,000 acre-feet located above Pathfinder Reservoir. Obviously if there was not enough water for the very small Colorado projects there was no reason for the authorization of the Kendrick project. Congress recognized the equity of the

[25] Act of August 18, 1894, 28 Stat. 422, 43 U. S. C. A. 461.

Colorado situation by enacting the proviso quoted above. Colorado has at all times since the passage of this statute urged that if a decree is to be entered which permits the operation of the Kendrick Project in Wyoming, Colorado must be given the benefit of the protection afforded by the Act. The Master recommends a decree which will permit the operation of the Kendrick Project in accordance with its priorities in relation to the North Platte Project and the so-called state line canals. At the same time the Master enjoins Colorado from water uses in excess of those presently existing. *The recommended decree by unqualifiedly limiting Colorado uses and expressly permitting use of water upon the Kendrick Project clearly and unmistakably violates the Act of August 9, 1937.* Of this there can be no doubt.

This Act is not an attempt by Congress to make an equitable apportionment of North Platte water between Colorado and Wyoming. It is merely the expression of Congressional intent that the Kendrick Project, being built with funds of the United States, shall not interfere with existing vested rights in Jackson County "or the fullest use hereafter for all beneficial purposes of the water of said stream or any of its tributaries within the drainage basin thereof in Jackson County." The Secretary of the Interior is not only authorized but is expressly directed to reserve by contract the power to enforce this provision at all times. The intent of Congress is clear. The Kendrick Project may not have a right which interferes either with the existing vested rights in Jackson County, including transmountain diversions, or with the fullest use in the future for beneficial purposes of the waters of the stream in its basin in Jackson County. This statute, while not a limitation on the power of the Court to accomplish an equitable apportionment, is a restriction or limitation on the rights of the Kendrick Project with relation to the Jackson County rights which are specifically protected. Thus, if an apportionment is made between the two states, Congress has expressly said that in virtue of the Kendrick Project, Wyoming cannot assert demands or impose obligations for

the delivery of water required for the purposes protected by the proviso.

The language of the statute is clear and plain and requires no judicial construction *(United States v. Missouri Pacific Railroad,* 278 U. S. 269-277, 49 S. Ct. 133). The Act contains a mandate to the Secretary of the Interior. This Court has said in *Escoe v. Zerbst,* 295 U. S. 490-494, 55 S. Ct. 818, that statutes are not directory when to put them in that category would result in serious impairment of the public or private interests which they were intended to protect.

If there is to be any injunction whatsoever against Colorado, then the provisions of the 1937 Act must be given full effect.

IV.

THE RECOMMENDATION OF THE MASTER PERMITTING MODIFICATION OF THE DECREE IS SERIOUSLY OBJECTIONABLE.

1. THE RECOMMENDATION WILL REQUIRE THE COURT TO EXERCISE ADMINISTRATIVE FUNCTIONS.

The eighth and final recommendation of the Master relative to the decree is as follows (R. 179):

> "Permitting any of the parties to apply at the foot of the decree for its amendment or for further relief, and retaining jurisdiction of the suit for the purpose of any order, direction or modification of the decree or any supplementary decree that may at any time be deemed proper in relation to the subject matter in controversy."

The purpose of this recommendation is to carry into effect the conclusion of the Master that the Court should retain jurisdiction to amend the decree if and when it shall be made to appear that important changes of condition have occurred or that any assumption as to the future, upon which the decree was based, has by subsequent experience proved erroneous (R. 122).

In other words, the idea is that the decree is not a fixed

or permanent thing but is changeable, dependent upon the vagaries of nature and the ability of mankind to forecast the future.

The State of Colorado conceives the function of the United States Supreme Court in an interstate suit to be that of determining whether or not one state of the Union has inflicted upon another state a serious injury to the substantial interests of the second state and, if such a condition is found to exist then, of awarding a suitable remedy for the injury. This theory is in line with the repeated statements of this Court made in exercising its original jurisdiction in controversies between states.

The other parties to this litigation and the Master, as is evidenced by his recommendation, have taken the position, and will no doubt continue to do so, that if there is a disagreement between states over the apportionment of the flow of an interstate stream, the states can take that disagreement to the Court and secure an answer without the necessity of making any showing of an existing or presently threatened injury. If the Master and the other parties are right in this position, then a new field of interstate litigation is opened up which will certainly not lessen the burdens of the Court.

In *Colorado v. Kansas* this Court remarked (320 U. S. 392) that a dispute such as the one here presents complicated and delicate questions and due to the possibility of future change in conditions necessitates expert administration rather than judicial imposition of a hard and fast rule. The wisdom of that statement is exemplified in the recommendation of the Master. The mistake the Master makes is that while he recognizes the possibility of future changes and the frailty of human intelligence in predicting the future, he nevertheless fails to recognize that *the solution of such a problem is administrative or legislative rather than judicial.*

No State has a greater appreciation than has Colorado of the fact that the distribution and use of water so as to secure the maximum benefit requires expert administration

day by day. While the definition of rights is a matter of great importance, the administration of streamflows so as to best satisfy the greatest number of priorities is the primary necessity. It is not being critical of the Court to suggest that it is not equipped to handle such an administrative problem.

Water supply varies from year to year, from month to month, and from day to day. Expert administrators are able to obtain the maximum benefit from the streamflow available at any one time.

The very rigidity and permanence of a court decree complicates rather than assists in water administration. Changes in water distribution because of an increase or a decrease in the available supply are proper objects of expert administration. Immediate action can be obtained; complaints can be heard and acted upon quickly; and water-use facilities are subject to immediate control. However, if it is necessary to obtain modification of a court decree before a surplus of water may be used, the time consumed in preparing the necessary papers, taking of evidence, briefing, and argument may be so prolonged that, before any decision is rendered, the surplus is vanished and has been succeeded by a deficiency. The matter is so self-evident that argument is useless. With the utmost deference, Colorado says that the Court should in this case follow the principles which it has so uniformly announced in the past and should not be concerned with a speculative apportionment of water not required to remedy any existing or immediately threatened injury.

2. THE COURT WILL NOT EXERCISE ADMINISTRATIVE FUNCTIONS.

It is well established that the Court will not exercise administrative functions. The recognized precedent on this point is *Muskrat v. United States*, 219 U. S. 346, 31 S. Ct. 250, wherein is quoted with approval an opinion of Chief Justice Taney in *Gordon v. United States*, 117 U. S. 697, 20 S. Ct. 1020. The Court said (219 U. S. 253):

"• • • While it executes firmly all the judicial powers entrusted to it the Court will carefully abstain from exercising any power that is not strictly judicial in its character and which is not clearly confided to it by the Constitution."

In *Federal Radio Commission v. General Electric Company*, 281 U. S. 464, 50 S. Ct. 389, this Court said that:

"It cannot give decisions which are merely advisory; nor can it exercise or participate in the exercise of functions which are essentially legislative or administrative."

Other decisions announcing the same rule are *Keller v. Potomac Electric Power Company*, 261 U. S. 428, 444, 43 S. Ct. 445, and *Federal Radio Commission v. Nelson Brothers*, 289 U. S. 266, 274, 53 S. Ct. 627.

Argument may be advanced as to the desirability of the Court acting in a case such as the one at bar in order that there may be a firm basis for the planning, construction and operation of water-use projects. The suggestion has been made by other parties that, when states cannot agree, they have the right to present their problem to this Court and have it answered. The Master in his Report states (p. 38) that all efforts of the states to settle their differences by compact appear to have failed and in a footnote on the same page he says that one of the great obstacles to settlement by compact is the existence of conflicting interests and antagonistic groups within the states. On page 122 the Master discusses the alternative of a dismissal of the case and says that it is not recommendable but the only reason which he assigns is that this would have the effect of discarding the present record and render fruitless the time, effort and learning devoted to the presentation of the case.

Colorado recognizes the desirability of settling the rights of the states in the use of the waters of interstate streams, and with pride says that it has entered into more interstate water compacts than has any other state of the

West.[26] The difference between Colorado and the other parties is that Colorado does not look upon an original suit in the United States Supreme Court as a substitute for a compact. Colorado says that this Court will determine whether or not one state has injured another and give appropriate relief, but that it will not assume the burden of writing a compact for disagreeing states. In this regard Colorado repeats what it said in its reply brief in *Colorado v. Kansas*. *Never has this Court undertaken to make a definite division of a water supply between states under circumstances such as here presented.* Never has the Court intimated that, if States fail to agree over the division of a water supply, they may rush to the Court and secure from it a formula which will be a cure-all for their administrative problems. Never has the Court imposed any restriction or limitation on the quasi-sovereignty of a state in the absence of a showing of serious injury to another state. Surely, if the vitality of the states is to be retained, the old rules should not now be either abrogated or relaxed. *To grant relief, to decree an administrative scheme or to adjudicate a cure-all for a social-economic problem every time states disagree among themselves is to destroy all incentive for that interstate cooperation which is essential to our federal system.*

8. A DEFINITION OF THE RIGHTS OF A STATE TO THE WATER OF AN INTERSTATE STREAM SHOULD BE ON A PERMANENT BASIS.

The reason for defining the equitable share of the state to the flow of an interstate stream is to determine the por-

[26] Colorado has entered into the La Plata River Compact, 43 Stat. 796; the Colorado River Compact, House Document 605, 67th Congress, 4th Session; South Platte Compact, 44 Stat. 195; Rio Grande Compact, 53 Stat. 785, and the Republican River Compact, 78th Congress, Ch. 104, Public Law 60, approved May 26, 1943. A compact on the Costilla River will be submitted to the next Colorado Legislature. Negotiations are under way for a compact on the Little Snake River. Apportionment between Wyoming and Colorado of the flow of the Laramie River was made by decision of this Court. Except for the fact that there has been no division between the Upper Basin States of Colorado River water, and that the recent decision of this Court in *Colorado v. Kansas* left undecided the rights of Colorado and Kansas to Arkansas River water conserved by Caddoa Reservoir, the only important Colorado stream on which no interstate apportionment has been made is the North Platte River.

tion of the flow which is subject to use and distribution under the local laws of each state. When this is done, the rights secured under state law effectuate the utilization of the state's equitable share. It is obvious that if the right of the state is subject to change according to the vagaries of nature or according to the ability of man to foresee the future, that uncertainty will jeopardize water-use projects dependent upon streamflows. If there is no permanent division of the streamflow then there can be no firm right to the use of streamflow in either state. This elementary fact is uniformly recognized in interstate compacts.[27] If apportionment is to be made by court decree rather than by compact, it is still essential that the desirability of a permanent allocation be recognized.

Colorado believes that there is no justification for the entry of any affirmative decree in this case and says that if there is to be an affirmative decree, then it should be upon a permanent basis and not upon a trial or experimental basis.

4. THE EFFECT OF THE RECOMMENDATION IS TO SHIFT THE BURDEN OF PROOF IN INTERSTATE LITIGATION.

As the law now stands a complainant state has the burden of showing that another state has caused serious injury to its substantial interests and the burden is greater than in a case between private litigants. In other words, before Colorado, an upstream state can have its actions controlled at the suit of Wyoming, a downstream state, Wyoming must show injury. The recommendation of the Master completely reverses the position of the parties. His recommended decree specifically restricts Colorado to specific uses but permits Colorado to apply for a modification if there should be an improvement in the water supply. Thus the burden is imposed upon Colorado of showing such a change in conditions as would justify the modification of the decree. In other words Colorado would be required to prove the negative of no injury. This reversal of the bur-

[27] For example, see the compacts referred to in footnote 26. The common provision is that the compact is subject to change only upon mutual consent.

den of proof is unfair and inequitable and should not be adopted.

CONCLUSION.

To Colorado the fundamental question in this case is whether or not a decree of equitable apportionment will be entered in the absence of a showing of an injury of serious magnitude. This issue concerns every state which contains within its borders a section of an interstate stream.

With confidence Colorado says that the traditional and accepted theories of American constitutional government require that in an interstate suit the Court should confine its actions to the determination and remedy of injuries. Matters of water distribution and stream regulation, involving no injury upon a state, should be left to the appropriate legislative and administrative agencies.

Respectfully submitted,

H. LAWRENCE HINKLEY,
Attorney General of the State of Colorado,

JEAN S. BREITENSTEIN,
GEORGE J. BAILEY,
THOMAS J. WARREN,
GAIL L. IRELAND,
CLIFFORD H. STONE,
Special Counsel for the State of Colorado.

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